MORRISON, Commissioner, Dissenting Opinion,

To this Order, I must respectfully, but strongly dissent. I am confident that my Commission colleagues are motivated by a sincere effort to comply with what they perceive to be this Commission's statutory duty to consider the effect of the proposed generating facility on the environment, as required by Code §§ 56-46.1, 56-265.2B and 56-580D. Additionally, the general policy of the Commonwealth to protect its air, lands and waters "from pollution, impairment or destruction," as set forth in the Constitution of Virginia, is said by the Majority to be a matter for implementation by this Commission, and thus also necessitates this Order. However, I am certain that implementation of this provision of our Constitution is the responsibility of the Legislature, which it has done through the creation of numerous executive branch agencies and the enactment of countless statutes.

The Majority's dedication to these lofty ideals is laudable in the abstract, but in the reality of this case it has led to a result which is plainly wrong, exceedingly unfair to the Applicant, and has far-reaching consequences to interests which were not participants in this proceeding. Worse, it is at variance with the legislative intent underlying provisions of law we are bound to follow, particularly provisions of the Virginia Electric Utility Restructuring Act, Chapter 23 of Title 56, Code of Virginia. It is also violative of our own *Rules of Practice and Procedure* in several serious respects.

Moreover, the Majority Order implies, though probably not intended, an unwarranted distrust of the competence of Department of Environmental Quality (DEQ) and the several agencies it coordinates that are properly charged by the General Assembly with the duty to implement the very constitutional provision held high by the

Majority. Just as unfortunate, though hopefully not intended, is the implied distrust of the professional competence of Fluvanna County local officials and emergency response personnel, whether volunteer or employed. Oversight of the quality of performance of these state and local agencies is beyond the authority, resources and expertise of this Commission and is a matter for the legislative and executive branches of government, state or local. As DEQ has stated, a forum distinct from this Commission is the proper place to review its processes and performance.

This is not to say that in every case coming before this Commission the evidence provided by DEQ or any of its constituent agencies cannot be questioned. Although I do not recall it ever having occurred, there could well be a proceeding in which a participant presents evidence by way of qualified experts that conflicts with that of state agencies or their reports, which we are bound to receive and consider as mandated in § 56-46.1 of the Code. Such a conflict may relate to air quality considerations, but could as well be concerned with historic resources, conservation and recreation, game and inland fisheries and marine resources concerns, and a number of other areas pertaining to environmental protection. In such a case, this Commission would arbitrate, as best it can, the disputed issue or issues, deciding the matter, I should hope, on the weight of the evidence. But this is not the case here. In this case there is no evidence conflicting with DEQ's coordinated review of the potential environmental impacts of the Tenaska facility, and there is no such issue for us to resolve.

As if to justify the sweeping rejection of DEQ's work in this case, the Majority states in footnote 38 that, "Moreover in several cases, the Commission, pursuant to its statutory obligations, has imposed conditions relating to the environment, in addition to

conditions imposed by DEQ," citing as an example a major transmission line certificate case decided this year to be routed through seven counties in Virginia. This transmission line case had absolutely nothing to do with air quality matters, and the conditions imposed beyond that of DEQ are quite typical in transmission line cases. Numerous route modifications were made, for example, in order to minimize the impact of the transmission line on landowners and the environment, but such conditions in no wise conflicted with those required by DEQ or other agencies regulating environmental issues.

Those who harbor a perception that this Commission's Staff is but the alterego of one or all Commission members, or that the Staff unfairly, if not improperly, influences our decisions in some ex parte way, should take note that in this case the position of Commission Staff is diametrically at odds with the Majority Order. (See *Post Hearing Brief of the Staff of the State Corporation Commission).*

Little wonder. The two Staff Counsel who very ably managed and conducted the Staff case must have assumed that the case would be processed and heard in keeping with our Scheduling Order of May 4, 2001, the Commission's *Rules of Practice and Procedure*; and that the Staff's position at the end of the day should be based upon the evidentiary record. No doubt the Applicant thought so, as well.

As a result the Staff's brief states this conclusion:

> *Tenaska's application meets the statutory requirements of § 56-265.2B of the Code. The Commission should issue a final order approving Tenaska's application for a certificate of public convenience and necessity to construct the proposed generation facility contingent upon the implementation of the conditions agreed to at the hearing in this proceeding, as identified above, the acquisition of all necessary environmental permits, and ECTI's completion of its environmental permitting process. Staff does not object to the Applicant's request for an exemption from Chapter 10, or for interim approval to make financial commitments and undertake preliminary construction work. Staff agrees*

> *with Tenaska's proposal that the record remain open and that the certificate itself shall not be issued until Tenaska files the appropriate environmental permits with the Commission. Finally, in its final order, the Commission should provide that the certificate of public convenience and necessity shall expire if construction is not commenced within two years of issuance of the certificate.* (Brief of the Staff of the State Corporation Commission, p.10)

I agree with this conclusion and would grant the application with the requirement that the Applicant comply with the recommendations of Commission Staff.

My sharp disagreement with the Majority Order is not due to a lack of appreciation of the environmental concerns expressed therein, or of those expressed by the public witnesses who testified before the Hearing Examiner. I also appreciate and share, to some extent, the views expressed by the Piedmont Environmental Council (PEC) concerning the cumulative impact on air quality of this proposed facility coupled with existing and proposed generation facilities. Candidly, however, the concerns I have are based on exposure to considerable information concerning environmental matters, air quality issues in particular, and simply the intuitive feeling that the more pollution sources are added, one on another, the greater the total pollution as a result. But I possess no particular expertise akin to that of the fundamental scientists and environmental engineers who presumably influence the regulations, policies and actions of federal and state environmental agencies. Neither is such expertise possessed by my Commission colleagues, and indeed it does not repose in any of our staff.

Our staff has not one environmental engineer, forester, hydrological engineer, water quality chemist, transportation engineer, or emergency management professional. The Office of the State Fire Marshal was removed as a unit from this Commission about two decades ago. All of these disciplines and professions, and more, appear to be

involved in the numerous issues attendant this case. Unlike rate cases involving charges by utilities, for example, we have no particular expertise bearing on many of the issues involved in this case. I do not believe this Commission's decision on the environmental issues should be entitled to any deference or wide discretion which often has been afforded Commission decisions by the Virginia Supreme Court. e.g. Central Telephone Company of Virginia v. State Corporation Commission, 219 Va. 863, 252 S.E. 575 (1979).[1]

I was a member of this Commission when the Clean Air Act Amendments of 1990 were enacted by Congress. This event, coupled with a heightened concern, nationally and in Virginia, for generation plant air emissions and other environmental protection measures affecting utility facilities presented a challenge to us. Clearly this Commission had to have access to a number of competencies in the environmental sciences, either by adding significant staff, or by gaining access to same by utilizing the services of such professionals as were already in the public service of the Commonwealth. The efficiency of avoiding duplication of staff competencies was obvious. Several weeks of discussions with Executive branch officials led to the Agreement in 1992 signed by members of this Commission and the Secretary of Natural Resources and the Executive Director of the Department of Air Pollution Control. This Agreement is attached to the Applicant's Comments and Objections to the Hearing

[1] Not that this is any consolation to this Applicant in face of the Majority Order. Far from being a final order which would be appealable, the Majority Order consigns the case to remand to the Hearing Examiner who is given a practically impossible task to devise some mechanism to deal with measuring ambient air quality and the future effects on same due to the cumulative impact of various types of emissions by an unknown quantity of new generation facilities and other sources of pollution in an area whose boundaries are unclear. Absolutely impossible is the Hearing Examiner's assignment to predict the effect of this facility on the future price of and transportation capacity for natural gas. The delay these considerations will entail is incalculable. One might suppose that this Applicant would much prefer a final order simply denying the application so that it can be appealed.

Examiner's Report. In the years since the Agreement, our Staff has received the invaluable assistance of expert witnesses on environmental issues through the efficient coordination of DEQ. It was through the cooperation framed in the Agreement, for example, that the Staff was able to receive analytical reports concerning this Application prior to the hearing, and present five witnesses employed by State environmental agencies.

I trust that the Majority appreciates the importance and value of the 1992 Agreement to this Commission, and does not intend its decision to signal a unilateral withdrawal therefrom.

Having a responsibility to adjudicate this matter requires that we put aside our subjective opinions and intuitive beliefs and base our findings and conclusions on the evidentiary record presented to us. I find that there is a complete absence of evidence to support the action taken by the Majority.

Strange as it may seem, I believe some discussion of what is and is not evidence and the parameters of "the record" is necessary. Our order initiating this case provided a typical schedule for filing notices of participation in the proceeding, the submission of prefiled testimony, and other matters. Additionally, pursuant to 5 VAC 5-20-80 C. of our *Rules of Practice and Procedure*, written comments in advance of hearing were permitted. Thus allowed, by counsel PEC and a number of individuals residing near the Tenaska site jointly filed comments attacking the project from several directions. Not that they needed to be, but these comments were not under oath; they were simply signed by an attorney. Contending that this Commission has authority to delay the schedule for transition to retail competition in Virginia, the comments urged that the SCC stay all

pending applications for power plants while it evaluates the market power problems evident in other deregulated markets to determine the true need and impact from additional power plant construction. The comments went on to detail a present coal-fired generation facility and newer generating facilities built or proposed, concluding that the cumulative impact of these plants on regional air quality and possibly health effects must be considered by the SCC. The commenters urged that the Tenaska application be denied and that "further implementation of energy market deregulation" be delayed.

Comments on behalf of PEC and the Fluvanna residents were filed in compliance with our May 4 scheduling order, but a large number of other letters and comments from various sources have been submitted to this file as late as January of this year. I place particular emphasis on the comments filed on behalf of PEC and the Fluvanna residents because they were the only prehearing comments filed in compliance with our Order, and because the Majority Order seems to give special weight to their value. Indeed, the Majority decision to require consideration of the cumulative impacts of other proposed facilities, together with the Tenaska facility, is a substantial positive response to much of the relief sought by PEC, et al. PEC did not become a participant in the case. Some of the individuals filing comments with PEC appeared as public witnesses and generally expressed a desire for the rural character of their residential areas to remain so. They opposed the plant because of undesirable emissions into the air, traffic problems, noise problems, and on other grounds as well. While their views are important to this Commission and should be considered, I can find no testimony from this group that would rise to the level of such technical expertise as to rebut the analyses provided by documents and witnesses sponsored by Staff Counsel.

I consider comments by PEC, et als. to have value to the extent of alerting the parties, Hearing Examiner and this Commission to various issues involved in the case, and the views of the commenters on those issues. But the comments are not evidence by any conceivable stretch.

Under current and long-existing past *Rules of Practice and Procedure* of this Commission, when we are called upon to hear a case only in our capacity as a court of record, the common law and statutory rules of evidence are followed as observed and administered by the courts of record of the Commonwealth. 5 VAC 5-20-190. These kinds of cases have been called "judicial," and are described as "adjudicatory proceedings" in 5 VAC 5-20-90. This Application, however, is a "regulatory proceeding" under 5 VAC 5-20-80 A. It is one in which we are called upon to exercise an administrative function delegated by the Legislature. As to these kinds of cases, 5 VAC 5-20-190 provides that "evidentiary rules shall not be unreasonably used to prevent the receipt of evidence having substantial probative effect." (emphasis supplied). Most typically, the Hearsay Rule has been relaxed of necessity; otherwise large amounts of financial and technical data would be almost impossible to be received in evidence during the course of our regulatory hearings. But the Rule speaks of evidence having substantial probative weight, and the evidence must still be supplied through the sworn witness, frequently called a "sponsoring witness," who is subject to cross-examination. It is important to notice that both regulatory and adjudicatory cases are entitled "Formal Proceedings" under Part II of our *Rules of Practice and Procedure*. So the comments filed prehearing by PEC, et als. and comments properly filed post-hearing by counsel for the hearing participants are clearly not evidence. Because they were allowed by

Commission Order, comments filed jointly by PEC and certain Fluvanna County residents equate to statements or arguments of counsel, and unless sponsored by a sworn witness at hearing, they cannot be more.

The evidentiary record in this case was at first regularly compiled pursuant to our *Rules of Practice and Procedure* and our Order initiating the case. Essentially there were two party participants, the Staff and the Applicant.[2] Tenaska presented two witnesses; the Staff eight.[3] Prefiled direct and rebuttal testimony was sponsored by witnesses who were cross-examined. Through these witnesses various documents and exhibits were received. These witnesses demonstrated an expertise in various disciplines and were thus qualified, I believe, to provide expert opinion evidence. While concerns were expressed about some related facilities to the proposed generation plant, there was a striking unanimity of support generally for the construction of the proposed facility. Obviously this is in stark contrast to the views expressed by the public witnesses who objected to the plant on numerous grounds, most prominently to the proposal to locate the plant in Fluvanna County.

The evidentiary record was closed after the hearing consumed one full day and a portion of the next. As far as an evidentiary record goes, this is it.

The Hearing Examiner filed his Report on October 23, 2001. As is the practice of our Hearing Examiners, his Report concluded with the following:

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[2] Columbia Gas of Virginia filed Notice of Participation and became a party; when its single issue was settled through stipulation at the outset of the case, it was relatively inactive during the hearing. It did file comments to the Hearing Examiner's Report seeking to correct an error in the Report.

[3] Technically, the Staff is not a party under our *Rules 5 VAC 5-20-80 D.* For convenience, Staff has been referred to as a party in this dissent.

> *The parties are advised that any comments (§ 12.1-31 of the Code of Virginia and 5 VAC 5-20-120 C.) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies within twenty-one (21) days from the date hereof. . . .*(omission). *Any party filing such comments shall attach a certificate at the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.*

It should be clear that the only persons entitled to file comments at that point were the parties who participated in the case, a total of three entities, Applicant, Columbia Gas of Virginia and Staff. They each did so. The record coming to us, then, and that which we may properly consider consists of the Prehearing Comments filed by PEC, et als., the Prefiled Testimony received by the Hearing Examiner, the Testimony of Witnesses and Exhibits received all as recorded in the transcript of the evidence, any stipulations and issues statements, the Hearing Examiner's Report and the Comments thereon filed as prescribed by the Hearing Examiner. Thereafter, unless we violate our own *Rules of Practice and Procedure*, all else is outside the record which we may properly consider. Fundamental fairness to the parties and all interested persons requires that we obey the rules and procedures we announced would be followed.

The Hearing Examiner's Report was like a major weather event, for it touched off a blizzard of paper and facsimiles pouring into various destinations within the John Tyler Building, most all of which comment upon the substance or merits of this Application, or supporting or opposing portions or all of the Hearing Examiner's Report, or urging us to decide this case this way or that, depending on the perspective of the filer or correspondent. Some have been addressed to the Commission Clerk, some to the Hearing Examiner, but many directly to the individual members of this Commission.

It should be understood here that this Commission has experienced many occasions when persons, particularly lay persons, transmit, ex parte, written communications to us. Obviously, such communications cannot, and are not, considered by Commission members in the slightest when the proceeding to which such communications are addressed is pending before us. It has been this Commission's practice over many years to have the Counsel to the Commission courteously acknowledge receipt of the communication, explain that members of the Commission cannot respond to same because of the pending matter, and advise that the communication will be "placed in the file." The Commission and Staff well understand that communications outside the scope of the record in a proceeding are well-intended and quite innocent of any knowledgeable intent to improperly influence this Commission, and that these types of extrajudicial communications bear no weight whatsoever insofar as any decision by this Commission is concerned.

Dynegy Power Corp., by counsel, submitted to our Clerk a 29-page document entitled, "Response of Dynegy Power Corp. to the October 23, 2001, Report of Michael D. Thomas, Hearing Examiner." This was received by the Clerk's Office on November 13, 2001, the day before the filing deadline prescribed. Until then Dynegy had not been heard from; and was not a party to the case. Dynegy's document did request "leave to file this response . . .," but no motion was brought on before us concerning such request, and no order granting leave to file was entered. To its credit, Dynegy was a post-record filer which certified the mailing or delivery of the document to counsel for other parties and Staff.

I think it plain that the proper handling of Dynegy's Request for Leave to File its Response would have been the entry of an order inviting a response from counsel for the Applicant within a specified time, so that each would have an opportunity to state an objection and the grounds therefor, requesting a hearing if necessary. It appears probable that Dynegy could have obtained the consent of Staff Counsel and counsel for the Applicant for the filing of its response, but there is no representation that such consent was sought or obtained. Thus, it was likely that the Dynegy response might have been properly considered with a little extra effort.

The Majority Order, not to be bothered by such procedure, simply states, "We will consider Dynegy's comment and the comments filed by others, including the DEQ and the Fluvanna County Board of Supervisors." Dynegy thus became the beneficiary of what appears to be a global sweep-in of all "comments" without limitation. Strangely, Dynegy's response is not at all important to support the Majority Order, for it quotes at length from the Dynegy document with disapproval.

On November 13, 2001, Staff Counsel sought to file "on behalf of DEQ" a six-page letter and a three-page attachment from the Director of the Office of Air Program Coordination of that Department. This was attempted by a covering letter of Staff Counsel to our Clerk with copies indicated to the other parties. Had the DEQ letter been incorporated in the Staff Comments to the Hearing Examiner's Report (called by Staff Counsel its "Post-Hearing Brief") it could be considered as a part of the record but, standing alone, I fail to see how it can be considered.

The Majority Order describes the DEQ letter sought to be filed by Staff Counsel as a part of the "Comments." Further, the Majority expressly recognized ten letters written by individuals and other entities as a part of the "Comments."[4]

Most of these communications are not only ex parte, they are secretive insofar as the parties to this case are concerned; copies are not even indicated to Counsel for the Applicant, or anyone else, in most cases.

While many of the communications may hold valuable information, I can conceive of no way in which I and my Commission colleagues may properly consider them, but whatever their content, they are ex parte communications. To consider them constitutes, I believe, a serious violation of our *Rule* 5 VAC 5-20-50, which states:

> *No Commissioner or Hearing Examiner shall consult with any party or any person acting on behalf of any party with respect to a pending formal proceeding without giving adequate notice and opportunity for all parties to participate.*

I am absolutely certain that the Majority would not consciously violate the Rule respecting ex parte communications, or any other. Likely they have understandably drifted into an overly receptive posture due to this Commission's longstanding practice of encouraging citizens, with or without counsel, to attend and testify at our public hearings, and when they do submit all manner of written material. But this is in the courtroom setting, with all other parties and their counsel present. Such public witnesses may be cross-examined, though they rarely are. We have encouraged a relaxed unintimidating atmosphere in cases in which public hearings are conducted, and I am afraid this policy against rigidity has led to the situation here – a record which seems to have no boundaries, indeed no end until transfixed by a Commission order.

[4] Actually the number of letters and memoranda arriving at our offices is greater than ten. Likely a number of these arrived after the Majority Order was drafted, but presumably they would be considered as a part of the "Comments" as well.

Perhaps the Majority have not imagined themselves in the position as a counsel for this Applicant. No matter how skilled, no counsel can respond to matters considered by any tribunal if such counsel is not even apprised of same. Counsel for Tenaska has no way of responding to just those extra-record items referenced in the Majority order, assuming counsel somehow gains information that they have been sent to us, for our Rules contemplate no further pleading by a party after the record is complete. After filing his Comments and Objections to the Hearing Examiner's Report, he must be silent, awaiting our decision, but he is entitled to assurance from us that other voices are quiet as well. We simply cannot allow the record to consist of anything beyond the Comments filed by counsel to the Hearing Examiner's Report.

Contrary to the views of the Majority, I believe the record is fully developed and ripe for decision. Thus, I strongly disagree with the Majority in every instance in which it directs the Hearing Examiner on Remand to "more fully develop the record." This amounts to a retrial of the major issues in the case when no party has requested it. In my view, this very elastic record as allowed by the Majority is, if anything, already quite over-developed.

Furthermore, the Majority has gone so far as to consider studies and protocols which are clearly not a part of this record. Much is made over something called a *Protocol for a Cumulative Impact Study* published by the Bonneville Power Administration ("BPA"). Recommendations are quoted from another document called *Virginia Tech Study*. The Majority seems to view these sources as highly important and authoritative, yet they are not a part of this record in any sense of the word. In fact, there is not so much as a pamphlet from either one of them in our official case file. Needless to say, they were not subject to examination by any of the parties. If these far-ranging, extraneous sources are to carry such weight in our decision, it seems to me that the

prefiled testimony of witnesses and the efforts of the participating attorneys were pointless, as was the hearing itself. I am most concerned with where this is taking us when I read on p. 25 of the Majority Opinion an excerpt from the *Virginia Tech Study*. That portion states that there needs to be an assessment "to include both the impacts on and impacts by the proposed power plant projects, the existing fossil-fueled power plants, fuel-switching options for already installed industrial and commercial facilities and potential new applications and technologies, such as distributed generation."

This kind of assessment would, it seems to me, to be a study of massive proportions, but its scope receives Majority Order approval. It states that the recommendation "makes sense, both scientifically and intuitively." As has been pointed out, anything approaching such an assessment is quite beyond the capabilities of the Hearing Examiner and any of our Staff. If the Majority have in mind the hiring of consultant services to perform such an assessment, I could not agree to the procurement of such services without a mandate from the Legislature for this Commission to become such a major part of environmental protection implementation. Furthermore, the Staff and financial resources of this Commission are already stretched to their maximums due to the significant time and expenditures we have been required to make, largely in connection with our duties in the implementation of the Virginia Electric Utility Restructuring Act.

Those who adjudicate cases should also subjugate their individual notions of what is good and bad science, as well as their intuitive inclinations, to not only the evidence in the case before them, but perhaps more importantly, to the requirements of law by which

they are governed. In this case I believe the Majority holding is unsupported by the applicable statutes and the legislative record revealing legislative intent.

First of all, delaying this case, and probably all others like it, for some indeterminable but probably lengthy time is inconsistent with the General Assembly's expressed goal of developing a reliable competitive market for generation in Virginia, as articulated in the Virginia Electric Utility Restructuring Act. A Staff witness and others testified that the Applicant's proposed facility would further competition. While it is true that the entire output of the plant will be sold into the wholesale market and thus not directly impact retail supply, we do not know absolutely that the wholesale purchaser under the tolling agreement will not in turn make part or all of the significant plant capacity available to competitive retail suppliers. Basic economics suggest that greatly increased supply at the wholesale level will eventually result in greater competition and lower prices at retail. As was pointed out by the Applicant in its Comments and Objections to the Hearing Examiner's Report, the action by the Majority appears to constitute a recission of the Commission's commitment to "make the Commonwealth an attractive market for competitive suppliers." (*STATE CORPORATION COMMISSION, STATUS REPORT: REDEVELOPMENT A COMPETITIVE RETAIL MARKET FOR ELECTRIC GENERATION IN THE COMMONWEALTH OF VIRGINIA, PART 3, 22)[August 31, 2001]).*

Such a radical and unjustified shift in Commission policy may well have the effect of causing, if not this developer then a number of others, to abandon Virginia because it is no longer a state, "open for business." Such a result will doubtless be

pleasing to some, but it represents to me a violation of our duty to further competition and the commitments we have made to the Legislature.

Section 56-46.1 of the Code requires that we give consideration to the effect of this facility on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact. But in doing so, that Code section requires that we "receive and give consideration to all reports that relate to a proposed facility by state agencies concerned with environmental protection. . ." This certainly articulates a preferred status of such reports insofar as their introduction into evidence is concerned. I believe it also implies, as well, recognition of the technically authoritative weight such reports are to be given. This does not foreclose the receipt and consideration of other reports and data that may be properly authenticated and introduced into evidence through the sponsorship of sworn witnesses. No such other reports were introduced, nor attempts even made to do so, in this case.

During the 2001 Session of the General Assembly, House Bill 2759 was introduced on January 19. The Bill would have added the following language to ¶ A of § 56-46.1:

> *The Commission shall consider the impact of nitrogen oxide emissions, if any, from the proposed facility, and the cumulative impact of nitrogen oxide emissions of the proposed facility and existing facilities in the locality of the proposed facility and any adjacent locality. Any result or report of the environmental impact of the proposed facility shall be available to the public prior to any public hearing held prior to approval of construction of the facility. The Commission shall not approve the construction of any facility where emissions from operation of such facility would result in a violation of national ambient air quality standards.*

In many respects, the objectives of HB 2759 fell far short of what seems to be envisioned by the Majority Order. The Bill required only the consideration of "nitrogen

oxide" emissions from the proposed facility cumulative to only existing facilities, not other proposed facilities, as well. It would not have required disapproval of the construction of any such facility unless the emissions from the facility would result in a violation of national ambient air quality standards. There is no suggestion anywhere in this case that the emissions from the Tenaska plant in a worst case scenario modeling will come anywhere close to causing such a violation. Thus, HB 2759 was a comparatively timid venture into the world of cumulative impacts, as compared to what seems to be the objective of the Majority Opinion, although their precise objective is, as yet, unclear to me. This Bill was referred to the Committee on Corporations, Insurance and Banking, where its short legislative life ended on January 30, 2001, when it was passed by on a vote of 25 – 0. This does not indicate to me that there exists some legislative intent that we become involved in measuring cumulative impacts of various emissions over and beyond, and perhaps contrary to, the activities of DEQ. The legislative intent revealed by this legislative record is precisely to the contrary.

Another area I believe pertinent in determining the consistency of our action in this case with legislative intent is discussed in the Majority Order on page 16. On Page 16 of that Order the Majority states, "Changes in circumstances and <u>in the law</u> (emphasis supplied) in recent years require that we review our approval of construction and operation of new generating facilities. There has been no change in the law recently with regard to this Commission's statutory duty to consider the effect of the construction of electrical utility facilities on the environment and to establish such conditions as may be desirable or necessary to minimize adverse environmental impact. That requirement was

first enacted as § 56-46.1 of the Code during the 1972 General Assembly Session. It became effective April 8, 1972, and has remained unchanged since that time.

What has changed, as correctly noted by the Majority, is that no longer is there a necessity for establishing that there is a need for new generation capacity to supply the utility's customers. The Majority Order correctly describes the manner in which we have evaluated applications for certificates of public convenience and necessity to construct new generation facilities. The authority of this Commission to approve the construction of electrical generation facilities without establishing such need was first accomplished in 1998 by the enactment of an amendment to § 56-265.2B, and the same authority was also granted in 1999 in § 56-580D of the Code which is a part of the Virginia Electric Utility Restructuring Act. But nothing else in this area of the law changed.

It is extremely difficult for me to believe that the Legislature removed the single most major barrier to the construction of independent power generating plants, or merchant plants, that being the requirement of a showing of need, and at the same time intended that this Commission impose a new regimen of environmental requirements that may pose as great, or greater, barrier to competitive wholesale plant construction than did the old need test. It should be pointed out that the effect of the Majority Order affects not just the facility this particular Applicant wishes to build. I do not see how all other plants, whether constructed by independent power producers or by our traditional incumbent electric utilities, can move forward until this new, but ill-defined, requirement is resolved, either here or, in the words of DEQ, in another forum. There is a Virginia incumbent utility application for approval of generation facility construction existing in our regulatory pipeline at present.

The Majority Order points out that it was only about a month ago when we entered an order adopting new Rules for filing requirements for applications to construct and operate electric generation facilities. In the same order we proposed and published further amendments to those Rules, docketing and assigning the proposed rules Case No. PUE010665. Complying with the requirements of § 12.1-28 of the Code, scheduling dates were specified, such as January 11, 2002, by which any person desiring to participate in a Staff work group concerning the proposed Rules should notify appropriate Staff; April 2, 2002, for persons to file notice of participation as a party; and May 24, 2002, for parties or other interested persons to file comments on the proposed amendments to the Rules. The Commission's Staff was directed to convene one or more work groups of interested parties "to explore the ramifications of the proposed Rules and whether there was any consensus with respect to the issues presented." The Order also recognized ". . .that these proposed Rules will likely be controversial and generate significant debate."

It was with some reluctance that I joined in signing the order proposing further amendments to the Rules we had just adopted. That the proposals would place considerable new burdens on Applicants is self evident. A paramount question in my mind then, as now, is whether those burdens are justified given the practical difficulty and limitations this Commission and its Staff will have in evaluating the new data required, particularly that dealing with environmental matters, some of which would be highly technical in nature. As discussed herein, we simply do not have that type of expertise housed in the Commission. Of particular concern was the proposed amendment to 20VAC5-302-20-12a. That proposed amendment will require that applications for

authority to construct electric generating facilities identify "the cumulative impact of Applicant's proposed facility and other proposed facilities on existing overall air quality in any area that may be impacted by the Applicant's proposed facility." "Other facilities" are defined, and the amendment requires assumptions regarding existing air quality be based on the maximum allowed emissions from existing permitted sources and the ambient level of pollutants from non-permitted sources. I agreed to the order because its terms provided ample time for a deliberative process with the invitation to affected interests to participate in work groups in an effort to reach agreement, or at least a wide consensus, as to what the final provisions of reasonable and useful amendments to the Rules might be, if any at all. I agreed that the deliberative, give-and-take approach, in the relative calm of a rulemaking proceeding to deal with environmental concerns, was in order.

While not directly relevant here, it also appeared that the amendments requiring information concerning market power issues do seem consistent with, and useful to, our duty under the Virginia Electric Utility Restructuring Act with regard to matters such as mitigation of market power, nondiscriminatory access to transmission and distribution systems and affiliate relationships.

Now, approximately one month after the entry of the order in PUE010665 proposing new Rules, the Majority Order appears to effectively impose the essence of the unadopted Rule change 20VAC 5-302-20-12a, which requires the cumulative emission impact analysis. This comes as a complete shock to me, and I am sure the Applicant and Staff Counsel in this case. Had I known that this irregular adoption of much of the proposed new Rules was to be the result in this, or any other similar, case, I would not

have endorsed the entry of the Order establishing PUE010665. Moreover, since the Majority Order, if left as it is, moots or pre-empts what is likely to be one of the most highly controversial areas of the proposed Rule amendments, there is no point in proceeding further in a significant portion of that rules promulgation process. Otherwise, we will have a two-track and duplicating effort going on at the same time, one being the unfortunate Hearing Examiner in this case wrestling with his unenviable tasks on remand, and the other being the Rules amendment promulgation process itself, including a work group or groups busying themselves with some of the same subject matter with which the Hearing Examiner is dealing.

This state of affairs is made necessary, say the Majority, because "We cannot, however, wait on the final order in that rulemaking to address this matter. As noted above eleven applications are now pending and more are on the way. We must act now." We knew those eleven applications were pending when we entered the order proposing a deliberative rule adoption process in the middle of just last month. I know not what has occurred since that time to override much of that process, but I know that it is unfair to this Applicant and many others who are similarly situated. Again, there has been no change in the law imposing new environmental protection implementation duties upon us. I do not believe that the number of plant applications pending and to come warrant the state of panic, or something similar, that has evidently caused the abrupt and radical change of course.

I am more skeptical than my colleagues about the numbers of generation plants which will actually be constructed in Virginia for a number of reasons. Constraints in the electric transmission and gas pipeline infrastructures in Virginia will be limiting factors

in some instances. There is some indication of a degree of retrenchment by some major energy developers concerning merchant plant construction investments. Unlike this Application, other projects will have more difficulty achieving approval of the numerous local and state permit requirements, quite aside from any action we might take on them.

By any comparative measure, the project which the Majority Order may scuttle involves an extremely clean electric generation plant placed in the middle of a 550-acre site. That this Applicant has been able to achieve a high degree of success as to practically all other local and state approval requirements is not surprising, and its success will not likely be shared by anything like all of the other applications for generation facilities which have caused such anxiety as expressed by the Majority Order. I must respectfully disagree with my colleagues and state that we do not have to act now in some sort of generic response to a perceived emergency, and in an order which is unsupported by the law or the evidence in the case. Furthermore, the Majority Order amounts to a *de facto* adoption of the substance of a significant portion of the proposed amendments to plant construction rules, ignoring altogether spirit, if not the letter, of § 12.1-28 of the Code, which requires reasonable notice of the contents of a proposed Rule to afford interested persons having objections thereto an opportunity to present evidence and be heard.

In 1992 the Supreme Court of Virginia held that Art. IX, § 3 of the Constitution of Virginia and § 12.1-28 of the Code require the State Corporation Commission to follow rules which it has duly adopted, and the same must be followed unless changed in the manner permitted by statute. *Va. Comm. for Fair Utility Rates v. VEPCO, 243 Va. 320, 414 S.E.2d 834 (1992)*. With the backdrop of a rules proceeding pending in Case No.

PUE010665, so much of the Majority Order, which pre-empts that proceeding as a matter of case decision, seems to violate that holding of the Supreme Court. The several instances discussed in which the Majority Order ignores, or is in conflict with, our duly adopted *Rules of Practice and Procedure* are in clear violation thereof.

Tenaska Virginia Partners, L.P. filed this Application with supporting testimony and exhibits one year ago. It plans to build a nominal 900 mw natural gas fired, combined cycle generation plant on a 550 acre site in Fluvanna County. It plans to begin initial clearing of the site in the spring of 2002, with the foundation installed in the summer of 2002, and commercial operation to begin in the summer of 2004. Although natural gas is its primary fuel, as a backup fuel for the facility, the Company would be able to operate the facility on an ultra-low sulfur distillate fuel oil (0.01% sulfur) limited for a maximum operation on fuel oil of 720 hours per year. This will require on-site storage of approximately 3.6 million gallons of distillate oil, which is enough to support 83 hours of operation at full dispatch.

The generation capacity of this plant is quite large, but the modern technology it utilizes when fired with natural gas results in its environmental consequences to the air to be surprisingly minimal. As described and condemned by a number of the Fluvanna County residents appearing as public witnesses, the VEPCO Bremo plant, a coal-fired facility which has existed for many years, produces significantly higher emissions of various types, yet its capacity is only about one-quarter of the proposed facility.

The use of backup fuel oil to run the facility became a major issue in the view of the Hearing Examiner, for he recommended that the use of fuel oil be denied altogether. It should be noted that the type of fuel oil Tenaska will use contains only about one-fifth

of the sulfur content of the industry standard, and is not even yet available on the market at the present time. The evidence was that this ultra-low sulfur content oil was expected to become available in June 2002. If and when the facility is ever run at a maximum rated capacity and burning fuel oil during the worst hypothetical weather and atmospheric conditions, DEQ found on the basis of scientific data and the requirements of the Clean Air Act that the impact from the facility under those conditions would be "diminimus."

However, the Hearing Examiner did recommend that this Commission grant interim approval to Tenaska Virginia, pursuant to § 56-234.3 of the Code to make financial expenditures and undertake preliminary construction work on the facility, and grant preliminary approval to Tenaska Virginia, pursuant to § 56-265.2 of the Code to construct the facility pending receipt and verification of the environmental and other permits necessary to operate. Principally because of the Hearing Examiner's rejection of the use of fuel oil, this Applicant was far from completely satisfied with the recommendations of the Hearing Examiner's Report, but at least, even if the Hearing Examiner's Report were followed by a Commission Order adopting the Hearing Examiner's recommendations, Tenaska might still meet its planned construction schedule.

Obviously, the Majority Order obliterates that schedule and delays construction commencement for an unknown, but lengthy, period of time.

The Applicant's *Comments and Objections of Tenaska Virginia Partners, L.P. to Hearing Examiner's Report* were understandably strenuous, characterizing the adverse recommendations as "arbitrary and capricious." Strong lawyer language, but justified, I believe in this instance.

If the use of fuel oil as a backup to better insure reliability is denied, it will be the first time this has ever occurred in Virginia. In fact, as a matter of historical policy this Commission, through its Staff, has strongly encouraged the contingent availability of alternate fuels to run generation plants in order to enhance reliability. Enhancement of reliability is the result of allowing generation to be fired by fuel oil, as proposed by Tenaska, and is consistent with one of the criteria the applicable statutes require that we consider.

The disposition of the fuel oil issue in the Majority Order leaves it far from clear as to what might ultimately be the fate of this issue. As to the fuel oil backup proposal, the Majority states: "In this case, it appears that the Hearing Examiner may not have considered all aspects of this matter in reaching his recommendation. Accordingly, we remand this issue to the Hearing Examiner to develop the record more fully, reconsider the matter, and make a recommendation to us." This Commission should simply enter an order rejecting the recommendation of the Hearing Examiner as to the denial of the use of fuel oil, if that is what the Majority Order really means to eventually do. Why agonize over such a decision as if the use of fuel oil in an emergency to run a generation plant is a novelty?

There is absolutely nothing more to "articulate" or to consider.

Our largest incumbent electric utility, Virginia Electric and Power Company, or Virginia Power, has in its current control area generation portfolio eight generation plants which burn fuel oil exclusively. These plants total winter net capacity of 2,718 mw. Because of the comparatively high fuel cost of oil and possibly the cost of emission allowances, these plants are the most expensive to run so that in the order of economic

dispatch they are typically the last to be operated; but in times of peak demand on the Virginia Power system they are dispatched, thankfully so. Even with these kinds of generation facilities running, Virginia Power did have to institute rolling blackouts when it exceeded its peak demand record during the winter season of 1992.

Virginia Power also owns six other generation stations which can be fired by oil or gas, and in practice the fuel oil is utilized as an emergency backup. These plants represent an additional winter net capacity of 1,687 mw. There are also dispatchable nonutility generators under purchased power contracts with Virginia Power which have oil and gas fuel capabilities. There are six of these having a winter net capacity totaling 1,952 mw. Thus, Virginia Power has in its control area 6,357 mw of generation capacity that can run on fuel oil, none of the fuel oil being of the ultra-low sulfur content of that proposed by this Applicant. With regard to the purchased power contracts between Virginia Power and the nonutility generators, many require fuel oil as a backup to the natural gas primary fuel in order to enhance reliability during emergencies.

As to emergencies, the Hearing Examiner states that he "cannot imagine a single situation where an 'emergency' will require the facility's operation on an alternative fuel to meet the demand for electricity in Virginia." If this is so, one wonders why the Hearing Examiner would deny the use of backup fuel oil, since he cannot conceive of it ever being used. If his principal concern is the use of fuel oil due to a "spike in natural gas prices," like the Hearing Examiner, I have difficulty in imagining such a situation occurring, although when it comes to energy prices in a competitive wholesale market, hardly anything can be said to be impossible.

We do know that during the aberration of greatly increased natural gas prices during the early part of the year 2001, the price structure of petroleum products also rose. Even with a four or five-fold increase in wholesale natural gas prices, the lines did not cross. The considerable oil-fired inventory of Virginia Power, as described above, was not unleashed because dispatching plants running on oil were still not economical.

One need not rely on imagination to evaluate emergency situations which reduce or choke off the supplies of natural gas. I was a member of this Commission on Christmas Eve of the year 1989 when the Commission and key Staff personnel were on the job due to the unavailability of needed natural gas supplies. This occurred because of abnormal, extremely cold weather, which blanketed the eastern half of the country including the deep southern states. Gas supplies did not flow freely because the wellheads were frozen in Texas and Louisiana. Subfreezing weather extended deep into Florida. We were called upon to order termination of gas supplies to low priority customers in order to insure sufficient natural gas to heat hospitals and other critical facilities. Gas-fired generation facilities were not as large a part of the generation stock of our utilities at that time, but those that existed needed to run on fuel oil if they were capable of doing so. We needed critical gas supplies for high-priority human health and safety needs.

Given the tragic events of September 11 last year, and the fact that we are said to be at war with terrorism, it is hardly imaginary to consider the possibility of interruptions in the interstate natural gas pipeline infrastructure. It is quite vulnerable to criminal acts of destruction, and while recovery from such an act could probably be achieved within days, we should wish to have available any type of alternative backup fuel.

In short, backup fuel oil is and has been a commonplace provision in order to enhance the reliability of electric generation resources. The proposal to use ultra-low sulfur fuel oil as a backup fuel at the proposed facility was not an issue raised by the participants at the hearing; it was not even identified as an issue in the Joint Issues Report that was filed at the request of the Hearing Examiner. It surfaced as an issue in the Hearing Examiner's Report, apparently having its origins in the mind of the Hearing Examiner. The Majority Order should not perpetuate further consideration of what was assumed to be a nonissue by the Applicant and Staff.

As previously noted, the Majority Order would have the Hearing Examiner, on remand:

> *. . .develop the record and make findings and recommendations on the influence the proposed facility would have on the price and/or availability of natural gas or transportation capacity for natural gas; further he is to make findings with respect to the influence of the facility on 'other utilities such as gas and water.*

This is the extent of the instruction manual to the Hearing Examiner on these global issues. It is an impossible task if it is to mean anything. Professionals who are far more competent to predict the future price and availability of natural gas are sometimes right, but often wrong. It is common knowledge that some make fortunes, and some go bankrupt. To more fully develop the record in this and other instances will, I assume, require further hearings by the Hearing Examiner, but if this matter ever returns to us by another Hearing Examiner's report, any response to this unreasonable request can be nothing more than the rankest speculation.

The Majority's discussion of economic development is completely at odds with the evidence. The Staff's evidence was that the facility will have a positive economic

development impact. Even the Hearing Examiner seems to grudgingly find this positive benefit, but gratuitously cautions that the Board of Supervisors of Fluvanna County must plan for the growth that may occur because of the businesses or manufacturing companies that may locate in the county as a result of this facility.

Strangely, based on nothing more than some fanciful scenario, the Majority finds the opposite. The Majority considers that there will be a deterioration of air quality to such an extent that there may be a "corresponding negative repercussion upon economic development." There is no shred of evidence suggesting that this facility will cause Fluvanna County to look like a barren moonscape in a science fiction film production so that "poor air quality would hinder the attraction of new jobs to an area." Fluvanna is an attainment area at present, with good air quality; all of the expert testimony and documents demonstrate that it will continue to be so after this facility is constructed. We have but to consider the fact that the eastern part of Virginia from Northern Virginia through the metropolitan Richmond area and Tidewater is of much poorer air quality. This portion of the state contains the nonattainment areas identified by EPA. If the Majority's speculation is correct, in these areas we should see a rust belt and a dearth of economic activity. Of course, just the opposite is true.

Here again, the Majority would have the Hearing Examiner "consider economic development as a part of his review on remand." The Hearing Examiner did so, giving something of a left-handed approval of the facility on economic development grounds. He had to do so, because that was the evidence before him. What more can he do on remand, unless he, too, is to imagine Fluvanna becoming so choked with noxious gases as a result of this facility that human beings will not wish to inhabit there.

The Majority Order would also have this Commission involve itself with water resource management over and above numerous agencies, federal and state, that are frequently the gatekeepers of water impoundments, discharges and withdrawals. The Hearing Examiner discusses at length the matter of the possibility of a reservoir that might be built by an affiliate of this Applicant, called ECTI. At the time the evidence was taken, it is my interpretation that the lake, possibly created in Buckingham County, was not a certainty. It was to be a backup water resource in times of low levels or low flows in the James River. Although the Hearing Examiner devoted considerable discussion to the water supply and possible lake construction by Tenaska's affiliate, the Hearing Examiner made no recommendation on the issue of water, stating to the effect that the evidence in the record is unclear whether Tenaska requires water from a reservoir proposed for Buckingham County for its operations when water withdrawals from the James River are curtailed, and whether the proposed reservoir would have an impact on the environment. Yet the Majority Report speaks of the Hearing Examiner's "Findings and Recommendations that relate to water supply." With no recommendation that we do so, and with alternative water supply contingencies not completely certain, the Majority also would remand the matter to the Hearing Examiner ". . .to develop the record concerning backup or alternative sources of water. . . and to recommend whether any conditions are needed in this area." Again, this will cause incalculable delay, but worse, the effect of the Majority Order is to set this Commission on a course of possibly regulating over and beyond the permitting requirements of the State Water Control Board, U.S. Army Corps of Engineers and likely other agencies. It seems to me that if a private sector entity, whether a public service company or not, can gain the approvals

required from all federal and state agencies to build a reservoir or lake using private capital, it is in the public interest that it be built, and the public interest in this instance is broader than that which we regulate. I fear that the remand of this issue will be seen as a meaningless meddling into matters which are beyond the responsibility of this Commission. Related somehow to this water issue was the Hearing Examiner's footnote on page 29 of his Report. In the Applicant's Comments and Objections, this footnote is noted as "curious." Footnote 10 on page 29 of the Hearing Examiner's Report discusses the Tenaska ECTI affiliate, a public service corporation, and thus having the power of eminent domain. The Hearing Examiner concludes that, "This is clearly an example of a public service corporation exploiting its right of eminent domain. This loophole in the law should be closed." The footnote is not only curious, it is quite late. As a result of a matter litigated before the Commission several years ago, the Commission did officially alert committees of jurisdiction in the General Assembly that the proliferation of public service companies, mainly telecommunications companies, was thereby greatly increasing the numbers of entities having the power of eminent domain. We did not use the term "loophole." A legislative study was authorized by a joint resolution. The recommendations of that study did not result in a change in the availability of the power of eminent domain, the concern raised by the Hearing Examiner.

The Hearing Examiner recommended that the CPCN issued to Tenaska should require it to incorporate procedures for contacting off-duty personnel in the facility's emergency management plan in the event of an actual emergency. This strikes me as regulatory overreach to the point of utter silliness. What business operation of any size is not going to contact off-duty personnel when needed in case of emergencies? The

Applicant objected to a certificate being conditioned on this requirement, as well as a requirement that Tenaska provide annual emergency response training for county emergency management personnel. This Commission has no more expertise than the man on the street in the area of emergency response, and it is presumptuous and ill-advised of us to continue giving life to an issue that is clearly within the official responsibility of Fluvanna County officials and a number of other federal and state agencies as described on page 30 of the Applicant's Comments and Objections to the Hearing Examiner's Report. This is why it is so regrettable that this is another issue to be remanded to the Hearing Examiner by the Majority Order ". . .to more fully develop the record on this matter and reconsider his findings and recommendations concerning this issue." But that familiar refrain is a bit different here, for the Majority says that the record on this emergency response consideration appears to be incomplete and does not provide a basis upon which to make an informed decision. This is because ". . .the concerns expressed by public witnesses and the lack of information in the record about the facts behind those concerns. . ." make it so. It is exceedingly strange to me that when there are no facts to support a concern the Majority does not simply dismiss the concerns as unsupported by the facts. This should be done by simply not remanding the matter to the Hearing Examiner on this issue, for none exists, and deciding as the Applicant urges, attaching no conditions which duplicate, override, or conflict with the responsibilities of other officials.

I am pleased to find that I agree with the Majority Order in its decision not to prohibit clear cutting of the buffer area of the Tenaska site, as was recommended by the Hearing Examiner. Encouraging a biodiverse stand of trees, the objective of the Hearing

Examiner, is certainly better left to the forestry management professionals, and this Applicant has committed to cooperate with those agencies having such expertise. Besides, it has been my observation that given time, mother nature herself will produce a biodiverse stand of trees.

As I draw to the end of this overly long dissent, I am compelled to discuss what I believe to be some of the most important testimony produced in the evidentiary record. A Dr. Greg Kunkel testified as an expert witness on behalf of the Applicant. An abbreviated portion of his testimony is mentioned in a short paragraph in the Majority Order, but nothing further is said about it. Because of the long term implications of the information he supplied, I believe it deserves more.

According to Dr. Kunkel, EPA established a "budget" to look at actual fuel use by utilities during three years baseline, 1995, 1996 and 1997, and then used economic modeling to project the growth rates in various states through the year 2007, which was the projected baseline. For electric utilities the reduction in oxides of nitrogen emissions amounts to 65% from that projected 2007 baseline. This EPA rule will come into effect in May of 2004, and for Virginia this means that a reduction of over 20,000 tons in nitrogen oxides emissions must be achieved from the electric generation sector alone. EPA sets the emissions cap, but it is up to the states to determine how allocations of reductions are to be made through what is referred to as "a call for state implementation plans, or SIP." Dr. Kunkel explained that this is a very large comprehensive program involving a regional issue, not just local. The NOx reduction program will also involve allowances similar to that for the fairly successful sulfur dioxide allowance program.

Thus, there will be a monetary incentive attached to NOx reductions and NOx emissions that use allowances.

The generation facilities proposed in this Application, including the use of ultra-low sulfur fuel oil represent the best available technology, and when it is run on natural gas its NOx emissions are surprisingly low considering its large capacity. Dr. Kunkel estimated that a coal-fired generation plant would emit oxides of nitrogen on an order of four to five times that of this facility.

Gas-fired generation plants characteristically emit very little sulfur dioxide gas, but NOx emissions are more prevalent; hence the generation plant in this Application is designed with several NOx reduction technologies.

Dr. Kunkel believes that the action by EPA, rulemaking and settlements being negotiated with utilities having large coal-fired generation plants, including Virginia Power, will eventually be quite effective in reducing NOx emissions, just as the Clean Air Act Amendments of 1990 and the staged SO2 emission reductions required thereby have been reasonably effective.

I think it is important to realize the implications of this testimony over a longer term. It means that older plants, many coal-fired, will cost more to operate, either by virtue of the expense of adding NOx emission controls, or running the plants and thus rapidly using NOx emission allowances. It is anticipated that a trading market for NOx allowances will develop, as was the case with SO2 allowances. Thus, there may be an economic incentive to adjust generation plant dispatch if it appears that more revenue can be gained by selling allowances rather than using them for generation. Although not expressly stated, the implication is that starting only two years hence there may be

significant incentives for much cleaner generation plants, such as this one, to displace to some extent generation plants that are "dirtier" in their emission characteristics.

I do not interpret this to mean that coal-fired plants are destined to be shut down and decommissioned. They should not be, because diversity of generation fuels is in the public interest, but some coal plants may be dropped from generation portfolios. Advances in clean coal technologies have been made, and it is also in the public interest to see that progress continue.

So it is that I believe that a serious negative impact of the Majority Order, perhaps not perceived by the Majority, is that it tends to deny Virginians a future in which they may enjoy an abundance of electric generation capacity supplied with much cleaner generation resources than we presently have. It is true that much of this new capacity will be generated for supply to the wholesale market, and possibly Virginia will be a state with a "glut" of merchant plant generators, as predicted by one of the public witnesses. It may possibly take a glut here in order to bring wholesale prices down to a level at which competitive retail suppliers can effectively compete with the relatively low rates charged by incumbent distributors. As has been stated and restated by commentators on the experience in retail competition in California and some other states, a fully functioning, robust wholesale market must be fully developed before effective retail competition can be achieved.

A baseload plant of this design and size, easily able to meet present air quality standards and known future emissions cap requirements, is the type we should be encouraging. It is clearly consistent with the General Assembly's objective to promote

competition both at the wholesale and retail levels. I am afraid that the action by the Majority in remanding this case is tantamount to a denial of the Application.

If the Majority Order issues with its remand provisions, it is my hope that upon any motion filed for reconsideration such reconsideration would be granted within twenty-one days from the date of this Order. Upon reconsideration I would urge that the Application be granted as recommended by Staff Counsel, but failing that, and upon request of the Applicant, that the Majority would enter a final order denying the Application if they must, so that this Applicant may appeal, as a matter of right, to the Virginia Supreme Court.